

ESTTA Tracking number: **ESTTA55977**

Filing date: **12/02/2005**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91167357
Party	Defendant Scyon Music, LLC Scyon Music, LLC 3218 Bilbrey Drive Murfreesboro, TN 37128
Correspondence Address	BARRY NEIL SHRUM GORDON, MARTIN, JONES, HARRIS & SHRUM 49 MUSIC SQ W STE 600 NASHVILLE, TN 37203-3231
Submission	Answer
Filer's Name	Barry Neil Shrum
Filer's e-mail	bshrum@abanet.org
Signature	/barry neil shrum/
Date	12/02/2005
Attachments	Response to Opposition v2.pdf (11 pages)

)	
Toyota Jidosha Kabushiki Kaisha,)	
t/a Toyota Motor Corporation,)	
)	
<i>Opposer,</i>)	Opposition No.: 91167357
)	App. Serial No.: 78/487,520
v.)	Mark: SCYON MUSIC
)	
Scyon Music, LLC,)	
)	
<i>Applicant.</i>)	
)	
)	

In response to the Notice of Opposition issued by the Board on November 4, 2005, the applicant, Scyon Music, LLC, a limited liability company formed pursuant to the laws of the State of Tennessee (referred to hereinafter as “Applicant”), answers the averments of the opposer, Toyota Jidosha Kabushiki, t/a Toyota Motor Corporation (hereinafter referred to as “Opposer”) as follows:

1. The averments of ¶1 of the Notice are admitted, except that Applicant has recently moved and is now located at 2025 Mosiac Trail, Murfreesboro, Tennessee 37130.
2. Applicant admits the averment of ¶2 of the Notice in as much as the application is a document that can be referenced, and so states.
3. In response to the averments of ¶3 of the Notice, Applicant states that the identity of Mr. Leopardi is not relevant to the proceedings in as much as the Applicant of the mark at issue is Seyon Music, LLC and the issue is whether Applicant's mark is

confusingly similar to Opposer's marks. Without waiving this objection as to relevancy, Applicant admits the averments of ¶3 that Emmett J. Leopardi is identified as the executive producer of the prerecorded compact discs that were identified as specimens of record in the application. With regard to the remaining averment of ¶3, Applicant cannot know what Opposer "believes," but nonetheless admits that Emmett J. Leopardi is sometimes known by the nickname "Jay."

4. In response to the averments of ¶4 of the Notice, Applicant states that the past employment history of Mr. Leopardi is not relevant to the issues in these proceedings in as much as the Applicant of the mark at issue is Scyon Music, LLC. and the issue is whether Applicant's mark is confusingly similar to Opposer's marks. Without waiving its objection as to relevancy, Applicant admits the averment of ¶4 that Applicant was the finance manager for Neil-Sandler Toyota Scion until the date that he was terminated as a direct result of Opposer's exertion of influence on Applicant's superiors regarding this matter.

5. Each and every averment of ¶5 of the Notice is denied.

6. The averments of ¶6 of the Notice are admitted.

7. The averments of ¶7 that the Opposer is the Registrant of the marks Registration No. 2,795,479; Registration No. 2,787,231; and Registration No. 2,845,698 are one record in the U.S. Patent and Trademark Office, and are therefore admitted. The averments of ¶7 of the Notice are denied to the extent that Opposer describes its Registration No. 2,787,231 as "S SCION & Design." That mark is officially identified in the records of the U.S. Patent and Trademark Office and on the Principal Register as "SCION." The records further identify the mark by its other characteristics, including "ovals, bands

and lines,” but no records describe or identify the mark with the letter “S.” Therefore, Applicant will refer to Registration No. 2,787,231 as SCION plus design.

8. Applicant is without sufficient knowledge to admit the veracity of the averments contained in ¶8 of the Notice and therefore denies each and every averment.

9. Each and every averments of ¶9 of the Notice is denied. *See Affirmative Defenses, below.*

10. Each and every averment of ¶10 of the Notice is denied. *See Affirmative Defenses, below.*

11. To the extent that ¶11 of the Notice avers that prerecorded compact discs can be used in automobile audio units it is admitted, but all other averments set forth in ¶11 are denied. *See Affirmative Defenses, below.*

12. To the extent that ¶12 of the Notice avers that prerecorded compact discs can be used in automobile audio units it is admitted, but all other averments set forth in ¶12 are denied. *See Affirmative Defenses, below.*

13. Applicant admits the averment in ¶13 that its application was filed on September 22, 2004, but is without sufficient knowledge to admit the veracity of the remaining averments contained in ¶13 of the Notice and therefore denies each and every remaining averment.

14. Each and every averment of ¶14 of the Notice is denied. *See Affirmative Defenses, below.*

15. Each and every averment of ¶15 of the Notice is denied. *See Affirmative Defenses, below.*

16. Each and every averment of ¶16 of the Notice is denied. *See* Affirmative Defenses, below.

17. Each and every averment of ¶17 of the Notice is denied. *See* Affirmative Defenses, below.

18. Each and every averment of ¶18 of the Notice is denied. *See* Affirmative Defenses, below.

19. Each and every averment of ¶19 of the Notice is denied. *See* Affirmative Defenses, below.

AFFIRMATIVE DEFENSES

In further answer to the Notice, the Applicant asserts the following affirmative defenses:

First Affirmative Defense

20. There is no likelihood of confusion between Applicants' mark, S SCYON MUSIC, and its three registered trademarks identified in ¶7 of the Notice, namely SCION, SCION plus design, and SCION SOUND PROCESSING, nor is there any likelihood that registration of Applicant's mark would cause confusion, mistake or deception of purchasers in violation of 15 U.S.C. §1052(d) for the following reasons:

(a) The word "SCYON" is inherently distinctive. It is not a word that can be found in any dictionary, but rather is a unique invention and formulation, derived from the acronym for the "Star Clusters Young & Old Newsletter," an internet-based newsletter publishing abstracts in astronomy relative to star clusters. Applicant chose this acronym because of its inherent distinctiveness and because it is used by some astronomers to refer to the brightest star cluster in the galaxy on any given night.

The inherent distinctiveness of the word “SCYON” is evidenced by the results of conducting a search on the Trademark Electronic Search System (“TESS”), which reveal that only Applicant has applied for the use of the distinctive word “SCYON” as a mark. In addition a generic search on the Internet reveals relatively very few usages of the word SCYON other than Applicant’s.

Comparatively, the word used by Opposer in its marks, *i.e.*, “SCION,” is defined in the *American Heritage Dictionary* (2nd Edition) as “a descendant or heir” or “a detached shoot or twig containing buds from a woody plant, used in grafting.” The word “SCION” is not unique or distinctive, as evidenced by a search on TESS, which reveals that there are five other registered SCION marks in addition to the four registered by Opposer, and countless other non-registered usages (*see* Second Affirmative Defense, *below*).

(b) Applicant’s mark is distinctively different from, and is therefore not confusingly similar to, Opposer’s marks. The S SCYON MUSIC mark, Serial No. 78487520, is a derivation of Applicant’s registered mark, Registration No. 3,017,840, a stylized “S” in the shape of a distinctive round sickle, combined with the words “SCYON MUSIC” printed below the registered stylized “S.” *See* Illustration A, below. Contrary to it’s description of Registered Mark No. 2,787,231, SCION plus design, none of Opposer’s marks utilize an “S” shape. The SCION plus design mark, Registration No. 2,787,231, is actually the word “SCION” embedded in an oval shape with surrounding wavy lines and bars. *See* Illustration B, below. The remaining two marks are word marks. There is no similarity of appearance, as can be seen in the illustrations below:

Illustration A



Illustration B



The Opposer's assertion that the two mark sounds similar to one another, while true, is not relevant because sound is not claimed by Opposer a feature of any of its marks.

(c) Contrary to Opposer's assertion that SCYON is the "distinctive word" in Applicant's mark S SCYON MUSIC, the *combination* of the word SCYON with the word MUSIC is the more distinctive feature of Applicant's trademark. In fact, the word "MUSIC" distinguishes the mark from any of Opposer's marks as much as the word "SCYON" does. As can be seen from Illustration A, above, it is actually the phrase "SCYON MUSIC" that is emphasized, as the two words stands together to form a distinctive element of the mark.

(d) There is no significant and viable relationship between Applicant's prerecorded compact discs and Opposer's motor cars and automobile audio units, other than the fact that prerecorded compact discs can be played in Opposer's products. A car charger for a cell phone, for example, can also be used in the 12-volt outlet in Opposer's motor cars, but that does not establish a "close relationship" between the car charger and Opposer's products sufficient to establish a "superior right" of Opposer to prevent the manufacturer of the car charger from using a mark it deems to be similar. There is very little likelihood that a purchaser with any modicum of care would actual mistake Applicant's prerecorded compact disc bearing the S SCYON MUSIC logo for either a SCION automobile or the stereo components in the automobile!

(e) Applicants' prerecorded compact discs are not sold through the same channels of trade as Opposer's motor cars and automobile audio units. The primary market for Opposer's products is the purchaser of automobiles. Their products are sold solely through authorized dealers. Opposer's market is very specialized and specific. In contrast, the primary market for Applicant's products is the general public, and its products are sold through normal retail distribution chains. Again, it is not at all likely that someone purchasing Opposer's motor cars and/or automobile audio units bearing the SCION or SCION SOUND PROCESSING marks are going to stroll into a Wal-Mart store confused because they see products bearing the S SCYON MUSIC mark. *E.g., see M2 Software Inc. v. Madacy Entertainment*, 421 F.3d 1073 (9th Cir. 2005) (M2 Entertainment did not create a likelihood of confusion with M2 Software where different marketing channels were used).

(f) S SCYON MUSIC is not at all related in connotation to SCION SOUND PROCESSING. Processing a sound does not music make. The connotation of "music" is very different from the connotation of either the word "sound" or the phrase "sound processing." SCYON is a distinctive word invented for a very specific purpose, while SCION is a common word.

(g) Because there is "no correct pronunciation of a mark," (*Cf. In re Belgrade Shoe Co.*, 411 F.2d 1352, 162 USPQ 227 (CCPA 1969)), and Opposer relies, at least in part, on the "sound" of the mark, Opposer has failed to aver grounds sufficient to establish that its marks would be pronounced the same as Applicant's mark, thus creating a likelihood of confusion. The more familiar term, SCION, is readily distinguishable from the unfamiliar, arbitrary and coined acronym, SCYON, such that there is little or no likelihood of confusion. *Cf. In re General Electric Co.*, 304 F.2d 688, 134 USPQ 190 (CCPA 1962).

Second Affirmative Defense

21. Substantially similar marks exist such that the Opposer will not suffer additional damage by the registration of Applicant's mark in that: first, the S SCYON MUSIC mark, Serial No. 78487520, is a derivation of Applicant's registered mark, Registration No. 3,017,840, combined with the phrase SCYON MUSIC beneath it, therefore, Registration NO. 3,017,840 is essentially the same mark as the mark presented in the application; second, the mark SCION OF SORCERY, Registration No. 2595560 has been registered in the same classification as Applicant's mark and was not opposed by Opposer (the same arguments that are made against Applicant's mark could have been put forth in opposition to the SCION OF SORCERY mark, *i.e.*, that the CD's are "complimentary products" and that the use of the distinctive word SCION could give the impression that the registrant's products are endorsed by Opposer); and finally, other usages of the word SCION exist in trade include, but are not limited to, usages for fishing reels (Reg. No. 2940086), paintball apparatuses (Reg. No. 2911702), publications (Reg. No. 2589172), wine (Reg. No. 2562186), forestry research, digital cameras and sensors, and digital interfaces for operation of remote computers. All of these usages have gone unopposed by Opposer.

Therefore, no additional injury will come to Opposer by the grant of the additional registration on behalf of Applicant, and Opposer is now equitably estopped from arguing otherwise. *Cf. Morehouse Manufacturing Corp. v. J. Stickland and Co.*, 407 F.2d 881, 160 USPQ 715 (CCPA 1969).

Third Affirmative Defense

22. The Opposer has failed to aver grounds sufficient to establish that Applicant has deliberately fostered a connection between Applicant's products and Opposer's

products. Applicant does not use, nor has it ever used, a SCION xB automobile for advertising its products sold under the trademark S SCYON MUSIC.

Fourth Affirmative Defense

23. The Opposer has failed to aver grounds sufficient to establish that Applicant has engaged in deceptive conduct in that Applicant does not use, nor has it ever used, a SCION xB automobile for advertising its products sold under the trademark S SCYON MUSIC.

Fifth Affirmative Defense

24. The Opposer does not have the right to assert a proprietary or superior rights in the marks as claimed because its marks are weak and dilute because at least five other entities have actually registered the mark SCION and numerous others use the word SCION as a unregistered trade name, including, but not limited to, usages for multimedia CD's (Reg. No. 2595560), fishing reels (Reg. No. 2940086), paint ball apparatuses (Reg. No. 2911702), publications (Reg. No. 2589172), wine (Reg. No. 2562186), forestry research, digital cameras and sensors, and digital interfaces for operation of remote computers.

Sixth Affirmative Defense

25. The Opposer does not have the right to assert a proprietary or superior rights in the mark SCION SOUND PROCESSING as claimed because its rights in the mark are limited and narrow. In trade publications and press releases, Opposer uses the mark SCION SOUND PROCESSING to refer to a digital method of filtering, equalizing and/or enhancing sound (called "DSP"), and, upon information and belief, does use the mark in

reference to the entire audio units, as described in its application. In fact, the audio units available in Opposer's automobile products are manufactured by Pioneer Automotive Electronics Sales, Inc. using the "PIONEER" mark.

Seventh Affirmative Defense

26. The Opposer lacks standing because it does not have proprietary rights in the word SCYON.

Eighth Affirmative Defense

27. The Opposer lacks standing because it does not have proprietary rights in the "sound" of the word SCION. All of Opposer's marks at issue are either word marks, or words plus design. The marks are not sound marks, nor do they claim sound or pronunciation as a feature of the mark.

Ninth Affirmative Defense

28. The Opposer has failed to state a claim upon which relief can be granted.

WHEREFORE, the Applicant asks that this opposition proceeding be dismissed and that its registration issue forthwith.

Respectfully submitted,

SCYON MUSIC, LLC

Date: December 2, 2005

By: /barry neil shrum/

Barry Neil Shrum, Esq.

Harris, Martin, Jones, Shrum, Bradford & Wommack

49 Music Square West

Suite 600

Nashville, Tennessee 37203

Telephone: (615) 321-5400

Facsimile: (615) 321-5469

E-Mail: bshrum@abanet.org

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

<p>Toyota Jidosha Kabushiki Kaisha, t/a Toyota Motor Corporation,</p> <p style="text-align: right;"><i>Opposer,</i></p> <p style="text-align: center;">v.</p> <p>Scyon Music, LLC,</p> <p style="text-align: right;"><i>Applicant.</i></p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p>Opposition No.: 91167357 App. Serial No.: 78/487,520 Mark: SCYON MUSIC</p>
--	---	---

PROOF OF SERVICE

I, Barry Neil Shrum, hereby certify that the foregoing Applicant's Answer to Notice of Opposition has been served upon the other party by depositing a copy of the document with the United States Postal Service with sufficient postage as First-class mail in an envelope addressed to:

David J. Kera
Oblon, Spivak, McClelland Maier Neustadt
1940 Duke Street
Alexandria, Virginia 22314

on December 2, 2005

By: /barry neil shrum/
Barry Neil Shrum, Esq.